Arumugam a/l Ponusamy v Karupiah a/l Ramasamy & Ors

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W–02–199 OF 2001

GOPAL SRI RAM, ABDUL KADIR SULAIMAN AND ABDUL AZIZ MOHAMAD JJCA

21 NOVEMBER 2005

Trusts and Trustees — Trustees — Removal — Express trust — Exercise of discretion by judge

The fifth defendant brought an earlier suit in the court below. That suit was compromised. The compromise was recorded in the form of an order of the High Court. By the terms of the compromise the first to fourth defendants were constituted as trustees of the subject land under an express trust. These defendants then proceeded to negotiate the sale of the land to a company called Saweena Group Sdn Bhd which intervened in proceedings in the court below. A sale and purchase agreement was entered into. The plaintiff was unhappy with the amount of the purchase price. He thought it was too low; that it did not reflect the true market value of the land; that it was at undervalue and not bonafide. Acting in a representative capacity he took out a summons to remove the first to the fourth defendants because he thought that they were not acting in the best interests of the beneficiaries. The learned judge who heard the summons dismissed it. He also directed the trustees to complete the sale. The plaintiff appealed.

Held, dismissing the appeal:

(1) Express trusts are all regarded as trusts for sale. A trust for sale is one under which the trustees are under a duty to sell with a power to postpone sale. This is because equity always regarded a trust for sale as personalty and not realty, even where the subject matter of the trust was land (see para 4).

(2) The trial judge, in his judgment said that he applied a fine-tooth comb to the evidence of value presented to him; that he carefully scrutinised the facts before coming to the conclusion that there were no grounds at all for suggesting that the sale to the intervener was at undervalue (see para 8).

(3) This was in reality an appeal against the exercise of discretion by the learned judge in the matter of the removal of a trustee. To succeed the plaintiff had to demonstrate that the judge committed an appealable error, such as taking into account irrelevant considerations or failing to take into account relevant considerations or asking himself the wrong question. That was a burden the plaintiff plainly failed to discharge in this appeal (see para 10).

(4) The plaintiff entered a caveat which was probably the reason why the intervener paid only 10% of the purchase price and did not want to risk its money by paying the balance. The plaintiff having caused the sale and purchase

to be delayed by reason of his caveat cannot now say that the intervener did not pay the balance. He was the author of that circumstance (see para 9).

[Bahasa Malaysia summary

Defendan kelima telah memulakan satu guaman sebelumnya di mahkamah rendah. Guaman tersebut dapat diselesaikan. Penyelesaian tersebut telah direkodkan dalam bentuk satu perintah Mahkamah Tinggi. Melalui terma-terma penyelesaian itu, defendan-defendan pertama hingga keempat telah dilantik sebagai pemegang amanah tanah tersebut di bawah amanah nyata. Defendan-defendan tersebut selanjutnya telah berunding tentang jualan tanah tersebut dengan sebuah syarikat bernama Saweena Group Sdn Bhd yang mencelah dalam prosiding di mahkamah rendah. Satu perjanjian jual beli telah dimasuki. Plaintif tidak gembira dengan jumlah harga belian. Beliau merasakan ia terlalu rendah, dan tidak menggambarkan nilai pasaran sebenar tanah tersebut, yang ia di bawah harga semasa dan tidak dibuat secara bona fide. Bertindak dalam kapasiti seorang wakil, beliau memohon saman untuk menyingkirkan defendan-defendan pertama hingga keempat kerana beliau fikirkan yang mereka tidak bertindak demi kepentingan benefisiari-benefisiari. Hakim yang bijaksana yang mendengar saman tersebut telah menolaknya. Beliau juga mengerahkan pemegang amanah tersebut menutup jualan. Plaintif telah merayu.

Diputuskan, menolak rayuan tersebut:

(1) Amanah yang nyata semuanya dianggap sebagai amanah untuk jualan. Suatu amanah untuk jualan adalah di mana pemegang amanah mempunyai kewajipan untuk jual dan mempunyai kuasa untuk menangguhkan jualan. Ini adalah kerana ekuiti sentiasa menganggap amanah untuk jualan sebagai personalty dan bukan hartanah, meskipun di mana perkara pokok amanah tersebut adalah berhubung tanah (lihat perenggan 4).

(2) Hakim perbicaraan, dalam penghakimannya menyatakan bahawa beliau telah meneliti keterangan berhubung nilai yang dikemukakan kepadanya; bahawa beliau telah meneliti fakta-fakta sebelum tiba kepada kesimpulan bahawa tidak terdapat apa-apa alasan untuk mencadangkan bahawa jualan kepada pencelah adalah pada nilai terendah (lihat perenggan 8).

(3) Ini pada hakikatnya satu rayuan terhadap penggunaan budi bicara oleh hakim yang bijaksana berhubung penyingkiran seorang pemegang amanah. Untuk berjaya, plaintif hendaklah menunjukkan bahawa hakim telah melakukan satu kekhilafan besar, seperti mengambilkira pertimbangan yang tidak relevan atau gagal untuk mengambilkira pertimbangan yang relevan atau bertanyakan soalan yang salah. Beban tersebut terletak pada plaintif yang nyata telah gagal untuk buktikan dalam rayuan ini (lihat perenggan 10)

(4) Plaintif telah memasukkan kaveat dan mungkin itulah sebab kenapa pencelah membayar hanya 10% daripada harga belian dan tidak ingin mengambil risiko membayar bakinya. Plaintif telah menyebabkan jual beli tersebut tertangguh

kerana kaveatnya sekarang tidak boleh menyatakan bahawa pencelah tidak membayar baki tersebut. Beliaulah yang menyebabkan berlakunya keadaan sedemikian (lihat perenggan 9).]

Notes

For cases on removal of trustees, see 12 *Mallal's Digest* (4th Ed, 2002 Reissue) paras 2278–2285.

Cases referred to

Khaw Cheng Bok & Ors v Khaw Cheng Poon & Ors [1998] 3 MLJ 457 (refd)
Letterstedt (now Vicomtesse Montmort) v Broers & Anor (1884) 9 AC 371 (refd)

Legislation referred to

Courts of Judicature Act 1964
Courts Ordinance 1948
Judicature Acts of 1873–75
Trustee Act 1949

Appeal from: Originating Summons No S3–24–2393 of 1993 (High Court, Kuala Lumpur)

Malik Imtiaz Sarwar (Ang Mean Leng with him) (Malik Imtiaz Sarwar) for the appellant.
Hamid Sultan bin Abu Backer (Francis Brigged with him) (Francis Brigged) for the first till third respondents.
M Palanimmah (Pala Mutu) for the fifth respondent.
Conrad Young (Sivanathan) for the sixth respondent.

Gopal Sri Ram JCA (delivering judgment of the court):

[1] This appeal is singularly devoid of any merit. It has to do with the discretion vested in the High Court to direct the removal of a trustee. The trust in the present case is an express trust. The subject matter of the trust is a piece of land which is owned by the Malaysian Dravidian Association having some 100 members. Let me now briefly explain how the trust was created.

[2] There was an earlier suit brought by the fifth defendant in court below. That suit was compromised. The compromise was recorded in the form of an order of the High Court. By the terms of the compromise, the first to fiurth defendants were constituted as trustees of the subject land under an express trust. These defendants then proceeded to negotiate the sale of the land to a company called Saweena Group Sdn Bhd which intervened in proceedings in the court below. A sale and purchase agreement was entered into. The plaintiff was unhappy with the amount of the purchase price. He thought it was too low; that it did not reflect the true market value of the land; that it was at undervalue and not bona fide. Acting in a representative capacity he took out a summons to remove the first to the fourth defendants because he thought that they were not acting in the best interests of the beneficiaries. The

learned judge who heard the summons dismissed it. He also directed the trustees to complete the sale. The plaintiff says that the judge was wrong. At the conclusion of argument my learned brothers and I did not agree. We dismissed the appeal. My reasons for dismissing the appeal are as follows.

[3] Historically, it was the Court of Chancery which recognised and gave effect to the device of a trust (originally termed a use during the reign of Henry VIII) and exercised supervisory jurisdiction over the trustees of a trust. Later, after the Judicature Acts of 1873–75, that jurisdiction was vested in the Chancery Division. By virtue of the Courts of Judicature Act 1964 read with the Courts Ordinance 1948, our High Court exercises the jurisdiction vested in the Chancery Division. It therefore has a general supervisory jurisdiction over trustees. This is quite apart from the statutory jurisdiction vested in it by the Trustee Act 1949 (Revised 1978).

[4] In accordance with modern equity jurisprudence, express trusts are all regarded as trusts for sale. A trust for sale is one under which the trustees are under a duty to sell with a power to postpone sale. This is because Equity always regarded a trust for sale as personalty and not realty, even where the subject matter of the trust was land. So too here.

[5] The court's supervisory jurisdiction over trustees and its power to remove a trustee were considered by Jeffrey Tan J in*Khaw Cheng Bok & Ors v Khaw Cheng Poon & Ors* [1998] 3 MLJ 457 where he referred to the following passage from *Halsbury's Laws of England* (4th Ed) Vol 48 para 783:

> The court will remove a trustee, including the trustee of a foreign settlement, where he refuses to execute the trust (see *Palairet v Carew* (1863) 32 Beav 564; *Luke v South Kensington Hotel Co* (1879) 11 Ch D 121) or has mismanaged the trust (see *Ex Parte Phelps* (1742) 9 Mod Rep 357; *Ex Parte Reynolds* (1800) 5 Ves 707; *Peatfield v Benn* (1853) 17 Beav 522) or has disqualified himself by his circumstances or conduct from continuing to hold the office (see *Millard v Eyre* (1793) 2 Ves 94) or may perhaps do so if his continuance in office would be likely to be detrimental to the trust owing to his being out of sympathy with its objects (see *A-G v Hardy* (1851) 1 Sim NS 338 at p 357) and with the beneficiaries. A trustee will not, however, be removed against his will on account of a pecuniary embarrassment which has ceased to exist and which does not appear to have imperilled the interests of the beneficiaries (see *Re Bridgman* (1860) 8 WR 598).

[6] Jeffrey Tan J then went on to say as follows:

> Story's Equitable Jurisprudence, s 1289 has the following commentary which was cited with approval by the Privy Council in *Letterstedt (now Vicomtesse Montmort) v Broers & Anor* (1884) 9 AC 371:
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> > ... it is not indeed every mistake or neglect of duty or inaccuracy of conduct of trustees, which will induce Courts of Equity to adopt such a course. But the acts or omissions must be such as to endanger the trust property to shew a want of honesty, or a want of proper capacity to execute the duties, or a want of reasonable fidelity.
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> In *Yusof bin Ahmad & Ors v Hongkong Bank (Singapore) Ltd & Ors* [1990] 2 MLJ 326, Chan Sek Keong J (as he then was) held that a trustee who failed to comply with the directions of the testator may be removed by the court even if no harm has been done to the

beneficiaries or to the trust. 'Friction or hostility between trustees and the immediate possessor or the trust estate is not of itself a reason for the removal of the trustees' (Letterstedt v Broers & Anor at p 389, per Lord Blackburn).

[7] I do not think that I can usefully add anything to the learning contained in the judgment of Jeffrey Tan J on the point under discussion. All that is left is to see whether the test laid down in the authorities referred to in his judgment has been met by the particular and individual circumstances of the present instance.

[8] The only real complaint of the plaintiff is about the purchase price. Now, it must be said at once in fairness to Hashim Yusof J (now JCA) who tried the case that in his judgment he applied a fine-tooth comb to the evidence of value presented to him; that he carefully scrutinised the facts before coming to the conclusion that there were no grounds at all for suggesting that the sale to the intervener was at undervalue. That is a conclusion with which I heartily agree. The other ground of complaint that was faintly suggested by learned counsel for the plaintiff in support of the appeal is that there was friction between the trustees and the beneficiaries. On the authority of *Letterstedt v Broers* that is not a ground for removal.

[9] All that needs to be added is that the intervener having dealt with the trustees as owners at law and at arm's length cannot be regarded as anything but a bona fide purchaser for value. Learned counsel for the plaintiff argued that this is incorrect because the intervener paid only 10% of the purchase price. But if you look at the facts carefully, you will find that the plaintiff entered a caveat which is probably the reason why the intervener did not want to risk its money by paying the balance. The plaintiff having caused the sale and purchase to be delayed by reason of his caveat cannot now say that the intervener did not pay the balance. He is the author of that circumstance.

[10] At the end of the day, this is in reality an appeal against the exercise of discretion by the learned judge in the matter of the removal of a trustee. To succeed, the plaintiff had to demonstrate that the judge committed an appealable error, such as taking into account irrelevant considerations or failing to take into account relevant considerations or asking himself the wrong question. That is a burden the plaintiff plainly failed to discharge in this appeal.

[11] For the reasons already given, this is a hopeless appeal. It was dismissed without calling upon the respondents. The usual orders consequent upon a dismissal were made.

[12] My learned brother Abdul Kadir Sulaiman JCA (now FCJ) and Abdul Aziz Mohamad JCA have seen this judgment in draft and have expressed their agreement with it.

Appeal dismissed.

Reported by Sally Kee